

2013

The Antimonopoly Tradition

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Bluebook Citation

Kenneth Lipartito, *The Antimonopoly Tradition*, 10 U. St. Thomas L.J. 991 (2013).

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ARTICLE

THE ANTIMONOPOLY TRADITION

KENNETH LIPARTITO*

I. INTRODUCTION

“Antimonopoly” was one of the most powerful words in the lexicon of nineteenth century America. Given meaning by a liberal skepticism toward the state, it took aim at private actors who sought to advance their own interests against those of the broad public, often by gaining favors from government. Antimonopoly had roots in the republican ideology of the American Revolution and, before that, seventeenth century English political thought. The language of antimonopoly expanded in popular discourse between the presidency of Andrew Jackson and the election of 1896. Though the antimonopoly discourse changed significantly over time, it retained common features: a classical economics that emphasized the virtues of those who labored and produced over those who skimmed profits, clipped bond coupons, and lent money at interest; a fear of private interests corrupting government; a belief that wealth and power should be broadly egalitarian, if not strictly equal; and an identification of monopoly with certain institutions, notably corporations, banks, and organized pools of capital.¹

II. THE HISTORICAL DEBATE OVER ANTIMONOPOLY

Historians commonly see the fierce antimonopoly tradition of the nineteenth century giving way to interest group politics in the early twentieth century. In place of classical economics, with its labor theory of value, came neoclassical economics, with its emphasis on consumer welfare.² In place of the republican tradition that emphasized the virtues of a free, independent, and virtuous citizenry, came a broad acceptance that groups and classes would pursue their respective interests through the political system.

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1. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1219–20, 1236–47 (1988).

2. Producerism refers to the belief that those who make things or provide services, either as owner-operators of firms or as workers, are the most valuable contributors to the economy, and that intermediaries, financiers, and passive investors do not contribute to material well-being and only extract the value due to the producers.

In place of a fear of concentrations of capital came an acceptance that corporations and banks were legitimate and useful means of mobilizing and allocating resources.³ The trajectory of this change is traced in antitrust policy.⁴ Although common law prohibitions of monopolies had long existed, America enacted a number of statutes designed to directly take on monopolistic structures, particularly those of the modern corporation that emerged in the late nineteenth century. The Sherman Act of 1890 is the most famous outcome of their efforts, though as we shall see, earlier state level antitrust acts and laws were important as well. Nonetheless, despite the success in passing laws, antimonopolists were disappointed in the results and applications of what they had achieved. During the Progressive Era (1900–1918), Presidents Theodore Roosevelt, William Howard Taft, and Woodrow Wilson brought antitrust cases against large corporations and even extended and augmented the laws. But antimonopoly ideas were pushed aside in favor of a more regulatory approach to big business. In place of the antimonopolists' goals of restructuring the economy, eliminating large corporations, and breaking up concentrations of power and capital, the new regulatory approach accepted the logic and efficiency of big business and only tried to trim its abuses.

The symbol of this change was the Supreme Court's 1911 Rule of Reason doctrine in the *Standard Oil Antitrust Case*.⁵ Even as it broke up Standard Oil, the Court ruled that the primary purpose of the Sherman Act was not to dismantle big business, but to distinguish between corporations that used illegitimate means to gain size and power, and those that grew large because of economic efficiency and market logic. Rather than restoring the small-scale economy that the antimonopolists valued, the courts legitimized the modern corporate economy.

Historians argue that from 1911 on, antitrust as an expression of antimonopoly was essentially dead.⁶ Indeed, the very definition of monopoly began to change. Whereas nineteenth century antimonopolists had used the

3. See generally ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995) (discussing the reform movement of the New Deal era and its eventual acceptance of modern capitalism); MICHAEL MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH 1865–1928* (describing the changing political attitudes of America); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955) (explaining that the hazards progressives feared of big business did not come to fruition); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS* (1988) (discussing the emergence of corporate capitalism).

4. The antitrust issue is discussed below.

5. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

6. See generally TONY FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880 TO 1990* (1992) (discussing the development of antitrust and big business and its place in public discourse); Peter C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law From Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815 (2012) [hereinafter *Remedies*] (discussing the remedies used in antimonopoly cases from Standard Oil to the present).

term freely to attack any concentration of capital and power that threatened the opportunities and independence of the small producer, the modern definition of monopoly is much more limited. It speaks only of hardships to consumers that result from a single producer exerting power in the marketplace.⁷ This shift is commonly seen as starting with the Supreme Court's 1911 *Standard Oil* ruling, continuing in the New Deal under the head of the Antitrust Division, Thurman Arnold, and culminating in the Law and Economics Movement of the 1960s, with Robert Bork's successful articulation of the consumer welfare paradigm into the courts. Bork's influential writings linked monopoly power to consumer welfare, and ignored the older connections to political power and the diminishment of economic opportunity. In this view all that mattered was how firm size affected the price of goods and options of consumers. Any notion of using the law to fundamentally restructure the economy was reduced to a utopian dream reflecting a distinct lack of modern economic sophistication.⁸

As I shall argue, there are reasons to doubt this narrative. Antitrust had more influence on economic behavior than its skeptics have understood. More broadly, antimonopoly language affected corporate policy in ways that contributed significantly to a more equalitarian and open political economy, even if it did not move the economy back to a smaller scale nineteenth century model. Antimonopoly distrust of technocracy, bureaucracy, and concentrated capital has significantly affected the public behavior of corporations, causing them to embrace notions of social welfare and social responsibility. The withdrawal of antimonopoly discourse from the political arena, I argue, has undercut the willingness of corporations to act in a socially responsible manner. These effects were greatly underestimated by economists and jurists who reduced antitrust to mere consumer welfare maximization.⁹

In the rest of the article I will discuss the history of antimonopoly language from the nineteenth century until the enactment of antitrust laws. I will then look specifically at the relationship between antimonopoly ideas and language and the rise of the modern corporation at the end of the nineteenth century. That section will be followed by a comparison of the older antimonopoly ideas and policies with the new antitrust law. Then I will

7. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 90–106 (1978) [hereinafter *ANTITRUST PARADOX*] (explaining the terms “competition” and “monopoly” in the context of antitrust).

8. See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000). See also *Remedies*, *supra* note 6, at 817; *ANTITRUST PARADOX*, *supra* note 7, at 417–18; Richard Hofstadter, *What Happened to the Antitrust Movement*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 200–04 (E. Thomas Sullivan ed., 1965); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 212–17 (1976) (discussing the use of antitrust law to promote economic efficiency); Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557, 557–58 (1993).

9. See generally Millon, *supra* note 1, at 1228 (putting forth a similar argument).

discuss how corporations changed their behavior in response to the new antitrust laws, and represented themselves as socially responsible institutions, allaying the fears of antimopolists. The final section will trace the post-World War II use of antitrust in place of antimonopoly policies, and then the decline of antitrust as well in the 1980s. I conclude by showing that with the decline of antitrust cases the antimonopoly tradition was effectively dead.

III. A HISTORY OF ANTIMONOPOLY LANGUAGE

Early in the nineteenth century antimonopoly had a much different meaning than it did by the late nineteenth century. In this period it was an expression of the producerist-republican tradition that emphasized the dangers of government in the private economy and critiqued the power of large aggregations of capital in corporations and banks. This language informed American economic policy and legal doctrine in the nineteenth century in ways that limited the power of private actors in the market. But it gradually changed in ways that accommodated the rise of large business corporations.

The antimonopoly creed followed a liberal tradition that regarded small government and vigorous private competition as beneficial to society. Antimonopolists were fearful of state power because they believed it interfered with individual freedom. But they also feared that the state would be captured by private interests seeking special economic favors—patents, land giveaways, and charters to incorporate or start banks. Such favors excluded competitors and allowed those on whom they were bestowed to grow wealthy at the expense of the public. They were, in the language of the nineteenth century, a tax on true production, which came from labor, particularly labor upon the soil. They undermined the natural order of the economy, leading to concentrations of wealth that only gave more power and influence to the rent seekers.

While the effects of monopoly on consumption were part of the antimonopoly creed, this was not a modern economic definition of consumption. The adversely affected consumers were also producers, and much of the criticism of monopoly was about the high cost of intermediate goods. Some of the biggest contests of monopoly in nineteenth century America, for example, were those between wheat and cotton farmers and the jute twine, cordage, and cotton bagging trusts—twine and cotton bags being important intermediate goods to wheat farmers and cotton croppers.¹⁰ Engrossing and monopolizing the essentials of life was an abuse to be sure, but the antimonopolists thought of themselves as producers facing upstream and downstream monopolies that worked against their ability to earn a de-

10. STEVEN L. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST 19-20* (1985); CHARLES POSTEL, *THE POPULIST VISION* 126-27 (2007).

cent living. Even grain and food were thought of as contributors to production—the fuel the farmer or worker needed to earn a living.

The center of the antimonopolist doctrine thus pitted the true, wealth-producing citizens against all who unjustly taxed away the earnings of that production. The producing class included small manufacturers, artisans, mechanics, skilled workers, and farmers, but could also encompass local merchants and banks that directly aided the producers. Not included were out-of-state banks, financiers, intermediaries who took advantage of a favorable position in the stream of commerce, and any interest that operated under a government-issued patent or monopoly. At the end of the day, trade and finance had “no fatherland but the till.”¹¹ Land and labor were the true source of the wealth of nations.

Corporations were the special targets of antimonopolists. In the seventeenth and eighteenth centuries, corporate charters usually included a monopoly right. For example, the British East India Company was granted a monopoly on trade with the Far East.¹² The monopoly grant was a subsidy for private capital performing some public service that would otherwise not attract enough investment. Private monopolies to build capital intensive projects such as bridges, canals, or turnpikes were also common in the eighteenth and early nineteenth centuries.¹³ The monopoly charter allowed managerial control and helped to assure adequate profits to the corporations undertaking these functions. Thus corporations as monopolies could be socially useful, but they had to be severely limited lest the monopoly privilege be abused for purely private ends.

In America, states used corporations to carry out internal improvements. Indeed, the United States chartered far more corporations than its European peers, and used them for a far wider range of purposes. It chartered not only public works like bridges and canals, but banking, manufacturing, and other seemingly nonpublic businesses. Though not formally mo-

11. Letter from James Russell Lowell to J. L. Motley (July 28, 1864), in *LETTERS OF JAMES RUSSELL LOWELL* 374, 377 (Charles Eliot Norton ed., vol. I 1894). See also DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862–1872* 73 (1967) (describing the radical reconstructionists' disdain of the mercantile classes).

12. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 22 (2003).

13. See EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860: WITH SPECIAL REFERENCE TO MASSACHUSETTS 196–97* (1954). See also GEORGE HEBERTON EVANS, JR., *BUSINESS INCORPORATIONS IN THE UNITED STATES: 1800–1943* 21 (1948); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970* 15 (1970); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846* 44 (1991); RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855* 5–6 (1982); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & M. Q.* 51, 54–57 (1993); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992). See generally JOHN L. LARSON, *THE MARKET REVOLUTION IN AMERICA: LIBERTY, AMBITION, AND THE ECLIPSE OF THE COMMON GOOD* (2009) (discussing the changes that occurred in the American economy between the Revolutionary War and the Civil War).

nopolies, these specially chartered entities were created to serve broad public missions, and thus to serve all producers equally.¹⁴

Though corporations found a place in America, the nation nonetheless limited and circumscribed their powers. In particular, monopoly rights were granted sparingly, and they were only obtained when explicitly granted, as the Supreme Court ruled in the *Charles River Bridge* case.¹⁵ The Charles River Bridge Company had been granted a charter to construct a crossing over the Charles River in 1785. When Massachusetts issued a second charter to another bridge company in 1828, the Charles River Bridge Company brought suit, claiming that its corporate charter gave it an implied exclusive right over river crossings. In that case, the Court ruled that the Charles River Bridge Company did not have such exclusive rights since none had been explicitly granted. The bridge company might have been given a corporate charter to mobilize capital to build the bridge, but that did not imply it could shut out competitors indefinitely.

Early nineteenth century antimonopolists also took a skeptical look at banks, another institution capable of mobilizing large quantities of capital and, even more, affecting credit, money, and prices. They saw such banking activity as potentially harmful to the “natural state” of monetary values, values presumably set by supply and demand, so as a way to draw off the earned income of the producer. The greatest expression of banking skepticism was President Andrew Jackson’s fight over the renewal of the Second Bank of the United States’ charter. This large, federally-chartered, though private, bank held sway over the nation’s money supply before the United States had a true government central bank. Jackson vetoed the new charter in 1832, and spoke in the language of antimonopoly to justify his decision.¹⁶

The bank, Jackson wrote, “enjoys an exclusive privilege under the authority of the General Government, a monopoly of its favor and support”¹⁷ Here, monopoly referred to a special favor and the unfairness

14. See Kenneth Lipartito, *The Utopian Corporation*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 94, 105–07 (Kenneth Lipartito & David Sicilia eds., 2004); Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits of Contractual Freedom in U.S. History*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 94, 105–07 (Kenneth Lipartito & David Sicilia eds., 2004).

15. See *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. 420, 516 (1837). For an analysis of the context and consequences of the Supreme Court’s decision, see STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

16. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 409 (1957); ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* 82 (1967) (describing the struggle between President Jackson and the Second Bank of the United States); STEPHEN MIHM, *A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN, AND THE MAKING OF THE UNITED STATES* 132 (2007); PETER TEMIN, *THE JACKSONIAN ECONOMY* 29 (1969).

17. President Jackson’s Bank Veto Message (July 10, 1832), available at <http://millercenter.org/scripps/archive/speeches/detail/3636>.

to other economic interests. Antimonopolists believed that favored institutions would grow large and rich at the expense of the common citizen. Maldistribution of income and wealth were the signatures of monopolies, which, to use an older legal language, engrossed resources and forestalled others from competing in the market. As Jackson noted, the bank was a “concentration of wealth and privilege . . . with no accountability to the public.”¹⁸ Such economic effects had political repercussions as well. “It is easy to conceive,” Jackson went on,

that great evils to our country and its institutions might flow from such a concentration of power in the hands of a few men irresponsible to the people . . . if any private citizen or public functionary should interpose to curtail its powers or prevent a renewal of its privileges, it cannot be doubted that he would be made to feel its influence.¹⁹

With their potential to concentrate wealth and power, monopolies were seen as the greatest danger the nation faced. Jacksonian antimonopolists intervened, seeking to free and restore the market to its natural order whenever possible. They removed and reduced restrictions on trade and business licensing, eased the way of ambitious entrepreneurs into trade, and permitted entry into the professions—law, medicine, and pharmacy—by those who undertook self-study and apprenticeship.²⁰ Professional licenses represented monopolistic protections that prevented equal opportunity.

Somewhat counterintuitively, Jacksonians also removed restrictions on incorporation. In place of special charters—favors given to insiders by legislatures—corporations could be now formed freely by any group of individuals.²¹ General incorporation statutes, with no grant of monopoly or privilege, democratized the corporation as a tool for ordinary business use and removed the connection between business and politics that led to privilege and monopoly. Likewise, while thundering against the powerful Second Bank of the United States, Jacksonians had no problem with local, state, and private banks, all of which were limited in their powers and subject to the forces of the free market.²² The Jacksonian antimonopolists were thus not anti-modern, anti-market, or even anti-finance. They were, as they saw it, merely working to assure that the economy operated according to the

18. *Id.*

19. *Id.*

20. KEITH M. MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 83–87 (1995); Charles Rosenberg, *The American Medical Profession: Mid-Nineteenth Century*, 44 *MID-AMERICA* 3, 163, 164–65 (1962).

21. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937* 11–64 (1991); David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, 1990 *DUKE L.J.* 201, 211 (1990).

22. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* 373–86 (2007).

natural law of the market with opportunity for all and special privilege for none.²³

We can see the manifestations of this early antimonopoly movement in the growing use of the term “antimonopoly” in the 1830s and 1840s. Chart 1 records the percentage usage of antimonopoly (with variant spellings) over time. The bubble around 1830 reflects the Jacksonian concern over special charters and privileges. It tracks closely with the rise of corporations at the same time, as seen in Chart 2.

CHART 1: OCCURRENCES OF “ANTIMONOPOLY” IN WRITING

Y axis: Percentage of all words

X axis: Year



Source: Google Ngram

CHART 2: OCCURRENCES OF “CORPORATION” IN WRITING

Y axis: Percentage of all words

X axis: Year



Source: Google Ngram

IV. ANTIMONOPOLY AND THE CORPORATION

Beginning in the 1870s, a number of new political parties took on the mantle of antimonopoly: The Greenbackers, the Patrons of Husbandry, the People’s Party (or Populists), the Knights of Labor, and the National Labor Union. Under their influence the voice of antimonopoly grew stronger. It also focused increasingly on the corporation, which rose to prominence after the Civil War (Charts 1 & 2). Antimonopoly groups struggled to deal

23. See HOWE, *supra* note 22, at 367–410; HOVENKAMP, *supra* note 21, at 1–66. See generally DODD, *supra* note 13 (describing the development of the law governing corporations); HURST, *supra* note 13 (discussing the development of the corporation from an entity formed out of privilege to a business form available to all applicants); Lipartito, *supra* note 14, at 94–119 (discussing the rise of the business corporation as an organizational structure).

with this entity in a changing economy that no longer fit the traditional liberal vision of small-scale enterprise and a limited state.

Between 1870 and 1900, the United States went through a corporation revolution. In key industries—petroleum, food processing, machinery, electrical devices, and a variety of consumer goods—large-scale business firms incorporated and began to dominate production and distribution. They joined those earlier manifestations of corporate scale and size, the railroads.²⁴ Seeking to protect their markets and reduce competition, the new corporate behemoths often merged and combined into still larger entities—generally termed trusts after the first legal form that these combinations took. Hundreds of trusts were formed, and many individual companies combined, culminating in a massive merger movement at the beginning of the twentieth century.²⁵

Having freed the corporation from the state and severed its ties to special privilege and charter, antimonopolists were chagrined to find that they had not in fact averted the monopoly danger. Private corporations, even without old style government monopoly rights, grew up to exert monopoly power all by themselves. In certain sectors—steel, oil refining, machinery, meat packing, and especially railroad transportation—private corporations were huge, powerful, and dominant. Whatever the modern efficiency-based justification for such behemoths, antimonopolists kept their focus on the social and political dangers of these large concentrations of capital and wealth. Corporations undermined the workings of the free market by taking away opportunities from other entrepreneurs. They violated the principles of classical economics by allowing manipulators of paper wealth and stock jobbers to profit at the expense of hard working true producers. They destabilized the basis for a republican system of politics by greatly increasing the distance between the wealthy and the poor. They presented clear and present dangers to the political system with their corrupting bags of money. They were, in the words of one critic, “war upon society.”²⁶

One example of this unjust economics was that farmers and producers had to pay high prices for needed goods and supplies controlled by large corporations. The price the farmer got for his wheat or cotton might fall. The price he paid for jute or twine was controlled by the cordage trust, the price he paid for his sugar by the sugar trust, the price for his tobacco by the tobacco trust, his whiskey by the whiskey trust. His mortgage was held by an eastern mortgage company that got financing from a giant eastern insurance company that took his premiums out of state and then sold that money

24. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 314–44 (1977) (discussing the evolution of industrial enterprises and how they followed the railroads’ example of integration and merger).

25. NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904* 1–2 (1985).

26. Millon, *supra* note 1, at 1227.

back to him at high (real) interest rates. Then when the farmer or producer went to sell what he made with his own labor, at prices determined by the monetary policies dominated by eastern financiers, he still had to pay the rates set by the only railroad that ran through his territory and take what he was given by the Chicago grain elevator monopoly that purchased and stored his grain.

According to the labor theory of value, it was impossible for hard working competent craftsmen, farmers, and producers to fail to prosper. True, a dissolute individual, lacking ambition and competence, might fail, but not an earnest farmer or honest workman. If they were failing then something unnatural must be taking place, for in the true natural market, labor always received its just reward. The proof that corporations were monopolistic was that they profited, while the honest toiler starved.

Massive maldistribution of income could only reflect some unfairness in the system, some untoward and illegitimate concentration of wealth, power and privilege interfering with true market values.²⁷ “The profits should be equally divided,” wrote Populist orator Tom Watson.²⁸ “But they are not so divided, as capital wants to gobble up all the profits.”²⁹ Corporate power reduced the nation to two classes, “tramps and millionaires.”³⁰ The results would undermine democracy, for “millionaires make paupers, paupers make anarchists, and anarchists destroy nations.”³¹ For workers who once aspired to property ownership and independence, corporate control of economic activity reduced them to a “vast industrial army with no hope and no aspirations.”³² In the end, democracy would fall to plutocracy. “[A]ll popular governments must depend for their stability and success upon the virtue and intelligence of the masses,” explained William Sylvis of the National Labor Union in 1865, “tyranny is founded upon . . . long hours, low wages, and few privileges.”³³

This was an economics deeply rooted in moral and even biblical faith. Americans read Adam Smith closely as a moral philosopher, and added an

27. Antimonopolists reasoned from effects—large corporations, maldistribution of wealth—to causes: power, property concentration, corruption of government. They also eschewed abstractions—the market led to some optimal outcomes based on theories of utility and welfare maximization—in favor of the lives of real, flesh and blood people. In a moral economy, hardworking people simply would not be treated the way they were. In a well-functioning, fair economy, it was not possible for honest, competent individuals to fail or to earn less than it took to live.

28. BRUCE PALMER, *MAN OVER MONEY: THE SOUTHERN POPULIST CRITIQUE OF AMERICAN CAPITALISM* 214 (1980) (quoting Thomas E. Watson).

29. *Id.*

30. POSTEL, *supra* note 10, at 224. *See also National People's Party Platform, in A POPULIST READER: SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS* 91 (George B. Tindall ed., 1966) (also referred to as the Omaha Platform of July 1892).

31. *Reform Thought*, *THE S. MERCURY*, Aug. 4, 1892, at 14.

32. PIOTT, *supra* note 10, at 52.

33. William H. Sylvis, Address Delivered at Chicago (Jan. 9, 1865), in *THE LIFE, SPEECHES, LABORS AND ESSAYS OF WILLIAM H. SYLVIS* 127, 129–30 (James C. Sylvis ed., 1872). *See also* PALMER, *supra* note 28, at 122 (discussing laborers' struggles against monopoly).

even deeper Christian piety to his words. The market was a result of natural law, God's law, such as the biblical injunction; from the sweat of his brow man ate his bread. Nineteenth-century Americans took the words of Genesis literally. Yet some were living lives of ease and luxury while others sweated plenty and had no bread. "God never intended there should be one man and one woman on the broad earth without the comforts of life equal to the demands of his being."³⁴ God had intended the bounty for all. "Larger equality in the distribution of the products of labor must obtain."³⁵ Anything less was "contrary to the Holy Writ."³⁶

Antimonopolists believed the solution was to use the democratic process to take back control of the economy from corporations and their bagmen who bought off government officials. Although the Jeffersonian tradition had argued for small government and Jackson had tried to remove government from banking and business, the new focus on positive use of the state still fit the antimonopoly framework. Democratic government by the people to restore the natural order of the marketplace was perfectly acceptable. It was faith in the republican form of government that led them to propose regulatory policies and state intervention in the economy.³⁷ "Any business that affects all of a great portion of the people, under conditions where there could be no successful competition by men of small capital is a government function and should be operated by government," explained North Carolina Populist Marion Butler, "for the benefit of all the people alike."³⁸ As another antimonopolist put it more succinctly: "The way to avoid railroad ownership of government is to have government ownership of railroads."³⁹ Government could restore the natural order of things, so long as it was government of and by the people.

Starting with the Greenback Party of the 1870s and continuing with the state-level Granger parties of the 1880s and the Populists of the 1890s, antimonopolists gained sufficient political power to make changes in laws. They passed state-level antitrust statutes to curb certain corporate practices. They encouraged the formation of state-level regulatory commissions to regulate railroads and other public utilities.⁴⁰ And they contributed to the passage of the national Sherman Antitrust Act (1890) and the formation of the Interstate Commerce Commission (1887).

34. PALMER, *supra* note 28, at 10.

35. *Id.* at 21.

36. *Id.*

37. See LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* (1976); POSTEL, *supra* note 10, at 161–63.

38. PALMER, *supra* note 28, at 77.

39. *Id.* at 42.

40. PIOTT, *supra* note 10, at 14–17.

V. ANTITRUST AND THE ANTIMONOPOLY TRADITION

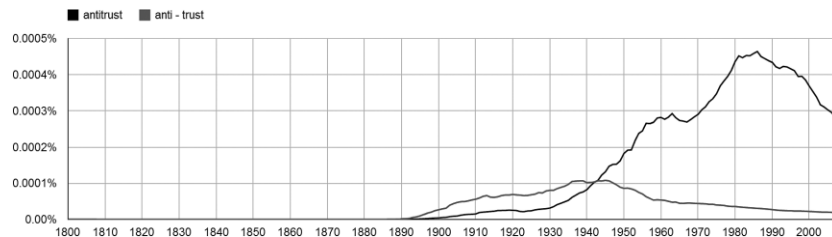
For many antimonopolists, the most comprehensive solution to what they perceived as the nation's economic maladies lay in structural change, using economic policy to reshape the economy to eliminate or at least scale back the large corporation. Gradually they focused on antitrust laws as the way to achieve this goal. By the early twentieth century, new antitrust laws had largely subsumed the older antimonopoly language and tradition.

The antitrust movement began in the hotbeds of antimonopoly sentiment, states such as Missouri and Texas.⁴¹ There, state attorneys general brought suits against powerful corporate combines using either common law doctrines or new legislative antitrust laws. These initial state efforts were soon followed at the national level with the passage of the Sherman Antitrust Act in 1890. The Sherman Act provided Theodore Roosevelt with the big stick he used against trusts, combinations, and monopolistic large corporations. After 1890, the term "antitrust" entered the American lexicon and grew steadily over the next century.

CHART 3: OCCURRENCES OF "ANTITRUST" IN WRITING

Y axis: Percentage of all words

X axis: Year



Source: Google Ngram

Strictly interpreted, antitrust law was about restructuring the economy to eliminate large corporations. It embraced the older antimonopoly language, regarding monopolies as economic as well as political dangers. As legal historian David Millon has argued, antitrust expressed "a tradition that aimed to control political power through decentralization of economic power"⁴² All combinations of power and privilege were to be treated as inherently suspect. This thinking reflected the antimonopoly position that in a natural order markets were open to all and fair in their results. Clearly this was impossible when very large firms dominated whole industries and were powerful enough to extract concessions from workers and small suppliers.

41. *Id.* at 27–28.

42. Millon, *supra* note 1, at 1220.

In 1889, Texas passed one of the nation's strictest antitrust laws, which aimed to "drive every trust and unlawful combination" out of the state.⁴³ The law forbade all, "combinations in restraint of trade and blocked one company from owning stock in another. Its passage had been pressed by farmers and ranchers who sought to regulate the companies that controlled the price of cotton bagging, beef, and other similar products, but it applied equally to the oil industry."⁴⁴ The result was to essentially bar petroleum industry giant Standard Oil from operating in Texas.

Standard Oil was infamous for leveraging its control of refining capacity to drive competitors out of business. As revealed in muckraking attacks by journalists Henry Demarest Lloyd and Ida Tarbell, the corporation extracted special rates for its oil from the railroads and forced the railroads to pay the company a "drawback" or subsidy on every barrel of competitors' oil they transported.⁴⁵ Fearful that Standard would take control of Texas's oil wealth, the Texas attorney general applied the strong antimonopoly law to effectively keep the oil giant at bay long enough to allow locally-based oil companies, notably Texaco and Gulf Oil, to emerge. "Without these laws," notes historian Joseph Pratt, "Standard Oil would have faced fewer and weaker competitors in the twentieth century. State laws in Texas and elsewhere released new competitive pressures in the oil industry in the first decade of the twentieth century."⁴⁶

When the Supreme Court articulated the so-called "Rule of Reason" in the federal antitrust case against Standard Oil in 1911, the justices modified the strict structural interpretation of antitrust law.⁴⁷ A monopoly built through efficient firm behavior was no violation of the Sherman Act, they decided. They had accepted the argument that scale economies and efficiency made some industries naturally monopolistic.⁴⁸ But the Court nonetheless broke up Standard Oil (as well as several other giant firms in other cases, such as American Tobacco).⁴⁹ The Court was also clear that the sort of cartel arrangements between firms found in Germany and France would

43. Joseph A. Pratt, *The Petroleum Industry in Transition: Antitrust and the Decline of Monopoly Control in Oil*, 40 J. ECON. HIST. 815, 821 (1980).

44. *Id.* at 819.

45. HENRY DEMAREST LLOYD, *WEALTH AGAINST COMMONWEALTH* 52 (1894); IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 38–69, 167–207 (1905).

46. Pratt, *supra* note 43, at 831. Other states called for state-owned pipelines and refineries to fight the oil giant, using public ownership against private monopoly. See PIOTT, *supra* note 10, at 113, 120–22; BRUCE BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890–1911* 140 (1979).

47. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61–67 (1911).

48. Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 YALE L.J. 373, 375 (1966); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 238–76 (1965); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1888–1918*, 50 OHIO ST. L.J. 257, 300–08 (1989).

49. *See, e.g., United States v. Am. Tobacco Co.*, 221 U.S. 106 (1910).

not be acceptable in the United States. U.S. laws banned collusive agreements, and the government periodically brought down the hammer to smash up big firms that had grown too powerful. Thus, much of the history of antitrust can be seen as carrying forth the values of open opportunity and competition, and the distrust of concentrated power that the antimonopolists had articulated and described in the nineteenth century.⁵⁰

It would be a mistake, therefore, to see the shift to a more regulationist mode that accepted the logic of large firms as simply bypassing or bringing to an end the antimonopoly tradition. Antimonopoly sentiment continued to challenge corporate behavior and antitrust policies worked against concentration of power and capital. Both continued to shape the American political economy for decades after 1911. As historian Daniel Rogers has pointed out, antimonopoly was one of the key languages of reform in the Progressive Era.⁵¹ During the later New Deal era, antimonopoly influenced the policies of Franklin Roosevelt's administration as well.

VI. THE CORPORATE RESPONSE TO ANTIMONOPOLY

One of the most important influences of the antimonopoly tradition was in how it changed twentieth century business behavior. Responding to multiple critics and stakeholders, including workers, farmers, and consumers, large corporations began to reposition themselves as socially responsible entities in the 1910s and 1920s. The corporate response to critics included a new set of plans and policies aimed to show that big firms were not dangerous monopolies but were instead valuable citizens. These policies included providing welfare benefits to employees—such as pensions, profit sharing plans, and insurance—and accommodating competitors and suppliers by reducing illegal, manipulative, and cutthroat business practices. In certain sectors, corporations accepted some aspects of government regulation, notably in railroading, telecommunications, and other utilities. In the 1920s, professional managers positioned themselves as stewards for the public good rather than robber barons and corporate buccaneers bent on profit at any cost.

Typical of this new group of public service oriented corporate managers was Owen D. Young of General Electric. Young wrote, "The old notion that the heads of business are the paid attorneys of stockholders, to exploit labor and the public in the stockholders interests is gone—I hope forever."⁵² He was echoed by Colonel Robert Frank of Standard Oil, the company that at one time had symbolized the trusts: "I am firm in my conviction that the personnel of a business organization, as well as its pol-

50. WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD I* (2002).

51. Daniel T. Rodgers, *In Search of Progressivism*, in 10 *REVIEWS IN AMERICAN HISTORY* 113, 113–32 (1982).

52. MORRELL HEALD, *THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900–1960* 97 (1988) (quoting Owen D. Young).

icy, its purposes, its current activities, its volume of business and its products are all matters of public interest and that these matters should be given as wide publicity as possible.”⁵³

Publicly-oriented firms often responded to critics by taking action designed to demonstrate that they were not out to monopolize their sector or destroy all competitors. United States Steel, for example, allowed its market share to fall from 66% in 1901 to 33% by 1930.⁵⁴ The steel giant had been condemned in the press with typical antimonopoly language: “It receives and expends more money every year than any but the very greatest of the world’s national governments. It absolutely controls the destinies of a population nearly as large as that of Maryland or Nebraska.”⁵⁵ The corporation nonetheless escaped the antitrust hammer, unlike Standard Oil. It did so by lowering, rather than raising barriers to entry, and permitting competitors to survive by eschewing price wars and cutthroat competition.⁵⁶

VII. THE NEW DEAL AND POST WWII ANTIMONOPOLY LEGACY

For a time company welfare programs and the new publicly-responsible orientation of corporate managers appeared to reduce the threat of antimonopoly. But after the nation fell into the Great Depression of the 1930s, talk of antimonopoly surged once again.⁵⁷ For a time it seemed that antimonopoly policies during the Roosevelt administration in the 1930s and 1940s would result in significant economic restructuring by vigorously pursuing antitrust cases and breaking up large firms. This did not happen, though the Antitrust Division of the Justice Department grew significantly and laid the foundation for a burst of antitrust activity after World War II. In the period between 1950 and 1980, antitrust greatly influenced economic policy in America, bringing forward the long-standing antimonopoly critique of corporate power.

As historians have pointed out, the changing economic priorities of the New Deal indicate that the Roosevelt Administration was ambivalent on the monopoly question. Roosevelt’s New Deal began with programs like the National Recovery Act, which seemed to embrace planning and accept business cartels. It shifted toward antimonopoly rhetoric after 1936, with a massive investigation into corporate concentration by the Temporary National Economic Committee. But despite strong rhetoric, Roosevelt only embraced antimonopoly partially, and with the outbreak of World War II became much more accommodating to big business in the interest of na-

53. *Id.* at 85 (quoting Robert Frank).

54. Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel’s Pricing, Investment Decisions, and Market Share, 1901–1938*, 49 J. ECON. HIST. 593, 594 (1989).

55. *Id.*

56. *Id.*

57. ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 283–383 (1966).

tional unity and wartime production. Many of the strongest legacies of the New Deal embraced regulation, not restructuring, as with agencies such as the Securities and Exchange Commission and the Federal Communications Commission.⁵⁸

The Antitrust Division under Thurman Arnold, some historians have argued, best represents the waning influence of antimonopoly. Historian Alan Brinkley has argued that Arnold was actually an antitrust skeptic, and had condemned the old style antimonopolists in his acerbic book, *The Folklore of Capitalism*.⁵⁹ Arnold ran the Antitrust Division not with the intention of breaking up big corporations or restructuring capitalism, but to regulate bad behavior and protect the interests of consumers.⁶⁰ He was thoroughly at home with the new marginalist economics and dismissed as backward old verities of a labor theory of value.⁶¹ Monopoly was simply a case of too few producers and too high prices for the consumer. Arnold's vision of antitrust seemed to anticipate Robert Bork's arguments by half a century.

There are, however, problems with this interpretation. Arnold and other major thinkers of the New Deal Era were steeped in the antimonopoly belief that corporations could grow dangerously powerful, even if they sometimes emphasized the cost of this power to the consumer rather than to other producers. Arnold presided over a substantial increase in the size and reach of the Antitrust Division and pursued monopolies with such zeal that he was eventually removed from the office by Roosevelt when the President turned more accommodating to big business during World War II.⁶² Before his removal, though, Arnold had established a strong, resourceful, and capable antitrust expertise in the federal government. "For perhaps the first time in U.S. history, the effort devoted to enforcing antitrust laws matched the rhetorical and ideological importance attached to them," writes historian Wyatt Wells.⁶³ This capacity would be brought to bear against business firms in ways that significantly shaped the American economy in the half century after Thurman Arnold's departure and before Robert Bork's articulation of the consumer welfare view of antitrust.

After World War II some of the nation's largest corporations came under antitrust indictments: RCA, Du Pont, General Electric, Western Elec-

58. See generally BRINKLEY, *supra* note 3 (summarizing the changing economic policies and positions of the New Deal).

59. See generally THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) (discussing the virtues and absurdities, the basic facts and inconsistent gospels of American capitalism).

60. Gene Gressley, *Thurman Arnold, Antitrust, and the New Deal*, 38 BUS. HIST. REV. 214-31 (1964); Wilson Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 BUS. HIST. REV. 1, 1-15 (1982).

61. Brinkley, *supra* note 8, at 567-70.

62. *Id.* at 564-65.

63. WELLS, *supra* note 50, at 207.

tric, Alcoa, and others.⁶⁴ Under Democratic and Republican administrations, half of the nation's one hundred largest industrial corporations faced antitrust actions. Though there was often no substantial structural change coming out of these cases, the effect was to shape business thought and behavior. "Aggressive prosecutions forced business to pay attention," writes Wells.⁶⁵

Antitrust cases of the 1950s and 1960s took special aim at practices that thwarted the opportunity for smaller firms or new entrants to compete in an established business or branch out into new areas. Fear of antitrust prosecution affected corporate strategy and managerial thinking along these lines. "Because of antitrust," notes William Becker, "corporate strategists had solid reasons to avoid the futile efforts . . . to gain total control of an industry by acquiring competitors or forcing them out of business."⁶⁶ Likewise, in their desire to avoid the hammer of antitrust, firms touted their socially responsible behavior. Ideas that had been bold departures for firms in the 1920s became commonplace throughout the large corporate sector of the 1950s. As Clarence Francis of General Foods put it, "Today, most managers operate as trustees in recognition of the claims of employees, investors, consumers and government."⁶⁷ The new "American business creed" held that "firms were expected to administer their businesses in the best long run interest of the public at large."⁶⁸ As the editors of *Fortune Magazine* wrote, perhaps a little too sanguinely, "Capital has become not the master of this society, but its servant."⁶⁹

This social responsibility positioning was not all window dressing. Large concerns that held near monopoly power invested heavily in socially valuable research and development, even in basic research from which they themselves might not profit. They also refrained from acquisitions in their home sectors. Du Pont, General Motors, General Electric, and RCA embarked on strategies of diversification built from their R&D investments.⁷⁰

The pattern and influence of postwar antimonopoly thought and practice is perhaps best exemplified through the history of telecommunications. Until 1984, AT&T had a virtual monopoly on telecommunications, one that had been legitimated rather than attacked by the Department of Justice fol-

64. William H. Becker, *Managerial Capitalism and Public Policy*, 21 *BUS. & ECON. HIST.* 247, 251 (1992).

65. WELLS, *supra* note 50, at 207.

66. Becker, *supra* note 64, at 250.

67. HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 49 (1953) (quoting Clarence Francis).

68. FRANCIS X. SUTTON ET AL., *THE AMERICAN BUSINESS CREED* 65 (1962).

69. THE EDITORS OF "FORTUNE" & RUSSELL W. DAVENPORT, *U.S.A.: THE PERMANENT REVOLUTION* 10 (1951).

70. DAVID HOUNSHELL & JOHN KENLEY SMITH, *SCIENCE AND CORPORATE STRATEGY: DU PONT R&D 1902-1980* 55-77 (1988); Kenneth Lipartito, *Rethinking the Invention Factory: Bell Labs in Perspective*, in *THE CHALLENGE OF REMAINING INNOVATIVE: LESSONS FROM TWENTIETH-CENTURY AMERICAN BUSINESS* 97-133 (Clarke et al. eds., 2009).

lowing a settlement in 1913, and then reaffirmed in the New Deal era.⁷¹ Nonetheless, AT&T felt the impact of antimonopoly during the second New Deal era, when Roosevelt shifted from his pro-cartel to pro-competition policy.⁷² It was subject to a massive investigation of all aspects of its policies and behavior, including its control over patents and technology, the lack of competition in telephone equipment supply, and the relationship between AT&T and the captive Bell Operating Companies that provided local telephone service throughout most of the nation.⁷³ The investigation provided the basis for an antitrust suit in 1949 against Western Electric, the corporation's captive manufacturer and supplier of equipment.⁷⁴ The suit sought to separate Western Electric from AT&T, while keeping AT&T a regulated monopoly of telephone service—the public utility end of the business.⁷⁵

A 1956 consent decree ended that suit. AT&T kept Western Electric; there was no structural change.⁷⁶ But the behavioral and strategic impact of the suit was profound. AT&T agreed to stay out of non-telephone lines of business and to license its technology to all who wanted it.⁷⁷ The corporation remained a regulated utility, but it invested its profits in research and development, notably through its research arm Bell Labs.⁷⁸ The Labs produced breakthrough technology that others would develop further—most famously the transistor, the basis of the entire digital revolution.⁷⁹ The result of such breakthrough technology was that a group of non-telephone electronics firms were permitted to develop the transistor for a wide range of non-telephonic applications without having to face a massive, dominant firm in competition. When Bell Labs scientist and transistor inventor William Shockley left the corporation for a startup venture in California, he seeded what became known as Silicon Valley with the young engineers and

71. See FED. COMM'NS COMM'N., Proposed Report of the Telephone Investigation 2–134 (1938) (describing corporate history and growth of the Bell system); TEMP. NAT'L. ECON. COMM., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 11829–11998 (1940) (describing the financing of AT&T).

72. INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, *supra* note 71, at 11846–89.

73. *Id.*

74. See *United States v. Western Elec. Co.*, (CCH) ¶ 68,246 (D.N.J. 1956).

75. ROBERT GARNET, *THE TELEPHONE ENTERPRISE: THE EVOLUTION OF THE BELL SYSTEM'S HORIZONTAL STRUCTURE, 1876–1909* 123–37 (1985); ALAN STONE, *WRONG NUMBER: THE BREAKUP OF AT&T 75–77* (1989); ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 126–53 (1989).

76. STONE, *supra* note 75, at 56–80.

77. *Western Elec. Co.*, 1956 Trade Cas. at ¶ 71,137–41.

78. Lipartito, *supra* note 70, at 133–34.

79. MICHAEL RIORDAN & LILLIAN HODDESON, *CRYSTAL FIRE: THE BIRTH OF THE INFORMATION AGE* 159–207 (1997); ERNEST BRAUN AND STUART MACDONALD, *REVOLUTION IN MINIATURE: THE HISTORY AND IMPACT OF SEMICONDUCTOR ELECTRONICS* 45–53 (1978).

scientists whom he hired.⁸⁰ The result was to take the transistor in unanticipated directions, none of which were controlled by the monopoly AT&T.⁸¹

VIII. THE END OF ANTIMONOPOLY

Considerations of the effects of antitrust (and more broadly, of antimonopoly) such as these were not incorporated into the much narrower consumer welfare perspective developed by Robert Bork in the 1960s and 1970s.⁸² Although not discussed herein, the impact of Bork's welfare-based treatment of antitrust was to sweep aside the old antimonopoly warnings about power, control, and equality. The loss of much of the antimonopoly critique of power and wealth concentration is reflected in the declining role of antitrust and anti-merger policies in America after 1980.⁸³

This decline of antitrust efforts has been a bipartisan endeavor. The best symbol of the change is once again AT&T. In 1984 the corporation was broken up through a consent decree from an antitrust case begun during the Carter administration. The case, *U.S. v. AT&T*, was built on two arguments: first, that changing technology had eliminated the need for regulation by shifting the telecommunications industry from natural monopoly to competition; second, that regulation enhanced rather than restrained the power and wealth of the regulated corporation at the expense of the consumer.⁸⁴ This was, in short, a consumer welfare argument. AT&T agreed to divest itself of its local exchange companies—the so-called “Baby Bells”—which provided local and regional service.⁸⁵ AT&T retained long-distance service and manufacturing, both of which would now be competitive. The argument supporting this result was that competition would spur innovation and lower prices, making for a more efficient telecommunications industry.⁸⁶

To some extent these predications were correct, with rapid innovation and marketing leading to the proliferation of mobile telephones and the unregulated development of the Internet. But the promise of competition was never fully realized. In 1996 President Clinton signed the Telecommunications Act that was meant to open all telecommunications services to competition. But that did not happen. Local service has remained largely uncompetitive, and the Baby Bells began to grow, with mergers increasing

80. Stephen B. Adams, *Regionalism in Stanford's Contribution to the Rise of Silicon Valley*, 4 ENTERPRISE & SOC'Y 521–43 (2003).

81. *Id.*

82. See *infra* Chart 4.

83. See *supra* Chart 1; *supra* Chart 3. The decline in U.S. antitrust and anti-merger policies after 1980 is reflected by the rise of use of “consumer welfare” in writing. See *infra* Chart 4.

84. *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1373–74 (D.D.C. 1981).

85. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 170 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

86. PETER TEMIN, *THE FALL OF THE BELL SYSTEM: A STUDY IN PRICES AND POLITICS* 219–35 (1987).

their concentration. Today two companies largely divide the local telephone market, and one of them, the former Southwestern Bell (later SBC) acquired its old parent AT&T. Keeping the AT&T name, SBC now controls a considerable portion of local, long distance, mobile, and other telecommunications services, putting back together parts of the old Bell System broken up in 1984.⁸⁷ Those who narrowly focused on competition and consumer welfare did not anticipate this result. Antimonopolists, on the other hand, would have understood that free markets do not necessarily remain free and open if corporations are not restrained from acquiring their competitors.

Meanwhile in other communications services, concentration and mergers have not led to competition and innovation as promised. Unregulated cable companies have established monopolies or duopolies in cable, on-demand video, internet, and mobile telephone service, with the result that the United States has some of the highest cable bills and slowest, least extensive broadband internet service in the developed world.⁸⁸ Overall, the United States ranks twenty-fourth in the world in broadband penetration.⁸⁹

Legislation that removed cross-ownership restrictions on media companies has also allowed consolidation of radio stations and newspapers. Large multimedia companies have the incentive, wealth, and political influence to exert pressure on the political system to gain for themselves further benefits. Such benefits could include: generous extensions of intellectual property rights, including patents; greater control over content; elimination of common carrier and network neutrality provisions; and strict enforcement of digital copyright laws against small content providers and internet service providers.⁹⁰ Even if consumers might benefit from lower prices—itsself a debatable outcome of such concentration—society could lose as a relatively small number of companies gain more control over media content, more power to control new technologies, and greater ability to block or acquire competing voices. These are the consequences of corporate power, an issue that is largely unheeded in the narrow concentration on consumer welfare model. We have missed or ignored the warnings of antimonopolists on how concentrated power and wealth have economic and political consequences in democratic societies.

87. Kenneth Lipartito, *Regulation Reconsidered: The Telecommunications Industry Since 1975*, 61 ENTERPRISES ET HISTOIRE 164–91 (2010).

88. HIBAH HUSSEIN ET AL., NEW AM. FOUND., THE COST OF CONNECTIVITY 2013 6 (Oct. 2013), available at http://newamerica.net/sites/newamerica.net/files/policydocs/Cost_of_Connectivity_2013_Data_Release.pdf.

89. THE BROADBAND COMMISSION, ANNUAL REPORT, THE STATE OF BROADBAND 2013: UNIVERSALIZING BROADBAND 98 (Sept. 2013), available at <http://www.broadbandcommission.org/documents/bb-annualreport2013.pdf>.

90. ROBERT W. MCCHESENEY, DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY 114 (2013).

CHART 4: OCCURRENCES OF “CONSUMER WELFARE” IN WRITING

Y axis: Percentage of all words

X axis: Year



Source: Google Ngram

While the antimonopoly trend has declined, sentiments connected to that language have not totally disappeared. They can still be sensed in the Occupy Movement, in the debates over banks that are too big to fail, in the rhetoric of Main Street confrontations with Wall Street, and in concerns raised about the maldistribution of wealth and income and the stagnation of wages. They can even be seen with the Tea Party and its attacks on corporations' special privileges and embrace of small business. Today's antimonopoly rhetoric, however, is fragmented and unfocused. It lacks the robust coherence of a theory of the political economy.

The antimonopolists of the nineteenth and early twentieth centuries had a coherent program. By that I do not necessarily mean a correct or desirable one. Probably in its nineteenth century form, with its roots in classical economics, the antimonopoly position was untenable. But it nonetheless offered a systematic critique that is now missing, on the dangers of corporate size, the corrupting influence of great wealth in politics, and the fundamentally antidemocratic consequences of a vastly unequal distribution of income. These missing elements have impoverished political language. Although the Tea Party identifies the nation's problems solely with government, their forbearer, Andrew Jackson, was quite clear that “[t]here are no necessary evils in government. Its evils exist only in its abuses.”⁹¹

Without the threat of antimonopoly, firms have much less incentive to position themselves as actors for the public good. Even if they desire to, they risk being undercut by competitors with no such aspirations. The threat of antimonopoly once helped to overcome this collective action problem. Without it, even the best-intentioned firms will find it difficult to act

91. President Jackson's Bank Veto Message, *supra* note 17. On the Tea Party, see generally THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* (2013) (finding that Tea Party supporters opposed perceived federal overreach and the transfer of taxpayer wealth to the undeserving); ROBERT B. HORWITZ, *AMERICA'S RIGHT: ANTI-ESTABLISHMENT CONSERVATISM FROM GOLDWATER TO THE TEA PARTY* (2013) (explaining the evolution of conservatism by examining the nature of anti-establishment politics from the 1950s to the ascendance of the Tea Party).

responsibly and hard to refrain from taking full advantage of an open political system.

IX. CONCLUSION

Antimonopoly language permeated liberal thought and ideology in nineteenth century America. It gave form to a deep-seated belief in open competition and opportunity for all and reflected a distrust of concentrated power, both in the public and private sectors. After the rise of large private corporations, antimonopoly thought gave birth to various reform movements that sought to check and limit corporate power.

Though the antimonopolists never achieved their goal of returning to a small-scale competitive economy, their ideas were picked up in antitrust law in the twentieth century. Antitrust policies followed the antimonopoly logic in the 1910s and 1920s, and caused corporations to voluntarily adopt a stance of social responsibility. The Great Depression called into question the efficacy of such volunteerism and, after some debate in the Roosevelt Administration, resulted in a significant strengthening of antitrust policy. Antitrust shaped post-World War II economic policy in America, keeping corporate power in check and encouraging corporations to maintain a pluralistic stance that acknowledged the importance of multiple stakeholders.

With the triumph of a narrower consumer welfare view of antitrust in the 1980s, the older antimonopoly concerns about power and responsibility declined. Antitrust went into eclipse, and corporate mergers and combinations were largely allowed to proceed with little opposition from government. The result has been to erode the corporate commitment to social responsibility and to increase the concentration of wealth and power in the private sector, much as nineteenth century antimonopolists had feared.